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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 633

SUPERIOR PACKING COMPANY, A CORPORATION,
PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 84–96) is reported in 63 F. Supp. 12. The opinion of the circuit court of appeals (R. 129–134) is reported in 156 F. 2d 193.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 5, 1946 (R. 135). A petition for rehearing was denied on September 5, 1946 (R. 145). The petition for a writ of certiorari was filed on October 21, 1946. The jurisdic-

tion of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTION PRESENTED

Whether the carload-discount provisions of Revised Maximum Price Regulation 169 and Maximum Price Regulation 398 required a meat packer to deduct 25 cents per hundredweight from the otherwise applicable ceiling price where it filled a number of orders comprising less than a carload each, by shipments in carload lots to one consignee in the purchasers' city.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942,[1] as amended, and of the applicable regulations are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

Petitioner, a beef slaughterer in St. Paul, Minnesota, sold and shipped by rail to customers in most of the larger Eastern cities large quantities of beef carcasses, wholesale cuts, variety meats, and edible by-products which were subject to Revised Maximum Price Regulation 169 and Maximum Price Regulation 398.[2] Under the so-called "Boston System," orders from several

[1] Hereinafter referred to as the Act.

[2] Hereinafter referred to as RMPR 169 and MPR 398, respectively.

purchasers in the same city, which were individually of less than one carload each, were shipped together in one consignment to make up a carload lot (R. 9–12, 31–33). The car was consigned to one customer at the railroad delivery point, although the contents were invoiced to two or more customers (R. 31–32). Upon arrival of a car, the consignee notified the other customers, and each arranged for transportation to his place of business of the portion of the shipment invoiced to him (R. 32). The petitioner always paid the freight on the car to the single delivery point, and each customer paid the transportation cost on its merchandise from such point to its place of business (R. 32).

RMPR 169, *infra,* pp. 11–12, and MPR 398, *infra,* pp. 12–13, which established price ceilings respectively on beef carcasses and wholesale cuts, and variety meats and edible by-products, provided for price differentials based upon the zone in which the delivery point was located, reflecting roughly the differences in transportation costs from the Mid-West, where most of the packing plants are located, to other parts of the country. Both regulations, however, contained "carload discount" provisions; both Section 1364.453 (b) of RMPR 169 and Section 15 (b) of MPR 398 required the seller to deduct 25 cents per hundredweight from the applicable zone price for meats "delivered in a straight or mixed carload shipment or sold as a part of a straight

or mixed carload sale . . ." In the transactions hereinabove described, the petitioner made no such deduction (R. 9–12). Treating such failure to deduct the 25 cent discount as overcharges, the Price Administrator brought an action for statutory damages, under Section 205 (e) of the Act, and for an injunction against further violations, under Section 205 (a) of the Act.[3] The petitioner contended that the carload discount provisions of the regulations were not intended to apply where carload shipments were made to meet purchase orders which were individually of less than carload size, and urged that the Statement of Considerations to RMPR 169[4] bolstered his position in this respect. After a trial of the issues and upon consideration of a stipulation of the parties as to some of the facts, the district court rendered an opinion and entered findings of fact and conclusions of law in which it found that the carload discount applied to shipments in carload lots of meat to fill orders individually of less than carload size, and that therefore the petitioner had violated the regulations as charged. On the ground that the petitioner had established that the violations were not

[3] The complaint also alleged certain additional violations of RMPR 169 in making a 25 cent per hundredweight delivery charge on boneless beef. Damages of $660.75, comprising one-and-one-half times the amount of the overcharges were awarded. The petition does not attack the correctness of the affirmance of this portion of the judgment of the district court.

[4] P. 13, *infra*.

the result of wilfulness or the failure to take practical precautions to prevent their occurrence, the court limited the recovery to single damages of $25,546.83 for violations of RMPR 169, and $3,606.89 for violations of MPR 398. Injunctive relief as prayed for in the complaint was also granted (R. 84–101).

On appeal, the circuit court of appeals affirmed, holding that the regulations in unambiguous language compel the discount where a carload shipment is made, regardless of whether it fills several purchase orders of less than a carload each (R. 129–134).

ARGUMENT

Petitioner's contention is that the carload discounts provided for in the regulations applied only where *sales* in carload quantity were involved, and not where carload *shipments,* each filling orders of several purchasers of less than a carload to each order, were made. This contention is refuted by the plain and unambiguous language of the regulations themselves. Section 1364.453 (b) of RMPR 169 and Section 15 (b) of MPR 398, which are identical in this respect apply the discount to meat which was "delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale * * *." As stated by the court below, "the first of these conditions, and not the second, applies perfectly to the stipulated facts." If the petitioner's construction

were correct and the discount applied only to *sales* of carload quantities, the second clause would be mere surplusage.

The intention behind the carload discount provision, as explained in the Statement of Considerations to RMPR 169 (*infra*, p. 13) was the reflection in ceiling prices of savings in certain costs when large quantities of meat were handled together. As the petitioner has pointed out, certain of such savings result when large amounts of meat are packaged, tagged, recorded, invoiced, and sold together. However, it is equally clear that other savings will follow shipment in carload quantities, entirely apart from the size of the sales themselves, because of the lower freight rates applicable to such shipments.

The petitioner places great reliance on the fact that one sentence [5] in the Statement of Considerations indicates the Administrator's attention to the former type of savings. It is submitted that this factor is more than outweighted by the many indications in the regulation itself that in creating the carload discount, the Administrator was concerned with savings in freight rates, at least as much as he was with savings resulting from the size of sales. For example, the definition of "carload", found in Section 1364.455 (a) (2) (i) of

[5] The sentence reads:

"This reduction roughly reflects the savings in handling and selling costs which are effected when a single buyer takes one delivery of a volume this large".

RMPR 169[6] includes a shipment by rail "of at least the minimum weight upon which the railroad carload rate from the point of shipment to the delivery point, as evidenced by the tariffs of railroad carriers, is based." And the same subsection also expressly includes a shipment of less than carload weight where the transportation charge for its shipment at the carload rate would be lower than the charge for such shipment at the less-than-carload rate.[7] On the other hand, other subsections of Section 1364.455 (a) (2) of RMPR 169 include within the definition of "carload" situations in which savings result from the size of the sale rather than from reduced freight rates. Section 1364.455 (a) (2) (ii) treats as a carload a shipment of 15,000 pounds or more by *motor truck* as "a single bulk sale transaction," and Section 1364.455 (a) (2) (iii) covers "a single bulk sale transaction" in which the buyer takes delivery of 15,000 pounds or more *at the seller's place of*

[6] P. 12, *infra*.

[7] Another indication of the Administrator's primary concern with the savings in freight rates rather than those arising from large sales as such may be found in an official interpretation issued on January 13, 1943, before any of the sales involved in this action: "*Carload discount-delivery to more than one point.* The carload discount required by Section 1364.453, Schedule II (b), is not applicable to the sale of a carload of meat to a chain store company where the seller delivers it in quantities of less than 15,000 pounds to the individual markets of the chain. The discount is required only where the carload is delivered by the seller to a single delivery point." (Pike and Fischer, *OPA Food Desk Book*, Vol. 4, p. 46,581.)

business. If it had been the Administrator's intention to require the carload discount on meat shipped *by rail* only where sales of carload size would be made, the same restriction to "single bulk sales transactions" would have been included in the subsection covering rail shipment.

Section 2 (a) of the Act[8] requires that every regulation or order of general applicability and effect "shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order." Thus, the primary purpose of the Statement of Considerations is the pronouncement of the reasons for the issuance of the Regulation. It may incidentally interpret the regulation as well, but need not necessarily do so. If it actually contains a comprehensive and deliberate interpretation, such interpretation is of course entitled to the same weight as is to be accorded to any other administrative interpretation under the doctrine of *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. Here, however, the sentence relied upon by the petitioner, contains merely an illustration of one of the three situations to which the carload discount provision applies—that of a shipment of 15,000 pounds or more as a single bulk sales transaction. It alludes neither to the delivery of 15,000 pounds at the seller's place of business, nor to the situation in the instant case, where several buyers'

[8] P. 11, *infra.*

orders of less than carload amounts are filled by a single rail shipment on which carload freight rates were charged. Where terms of the regulation are certain and the interpretation does not clearly contradict its terms, it is neither necessary nor proper to endeavor to stretch the interpretation into a contradiction of the regulation, and then to resolve the artificially created conflict against the terms of the regulation. In fact, even where the Statement of Considerations is not in harmony with the regulation, if, as here, the terms of the regulation are unambiguous, its provisions must prevail. *Bowles* v. *870 Seventh Avenue Corp.*, 150 F. 2d 819, 821 (C. C. A. 2d), certiorari denied, 326 U. S. 780.[9]

Petitioner makes much of the fact that there was an alternative method of shipment, referred to as the "Washington System," whereby it could have complied with the regulations and made more profit than it did under the system actually used. If by this comparison, petitioner means to assert that the administrator has been arbitrary in his carload discount rules, the objection may not be raised in this enforcement action, but only in the Emergency Court of Appeals, because of the exclusive jurisdiction provisions of Section 204 (d) of the Act. Furthermore, if the regulations did indeed permit petitioner to make

[9] The Statement of Considerations discussed above was issued in connection with RMPR 169. There was no similar statement issued with MPR 398.

excessive charges with impunity by employing a different delivery system, it would scarcely be a reason for the courts to hold that a seller who has failed to use the other delivery system, may subsequently escape liability by showing that he could have circumvented the regulation. But no loophole in fact exists. There was sound economic basis for the difference in the respective treatments of the "Washington" and "Boston" systems by the Office of Price Administration (R. 25).

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and the case does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1946.

APPENDIX

1. Pertinent provisions of Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 632) 50 U. S. C. App. Supp. V, Sec. 901 et seq.:

> Section 2 (a) * * * Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order.
>
> * * * * *
>
> Section 204 (d) * * * Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

2. Pertinent provisions of Revised Maximum Price Regulation No. 169 (7 F. R. 10381, 8 F. R. 9996):

> Section 1364.453 (b). Carload discount. For all beef carcasses and/or beef wholesale cuts and/or other meat items scubject to this subpart B and section 1364.453 and section 1364.454, delivered in a straight or mixed carload shipment or sold as a part of a straight or mixed carload sale, the

seller shall deduct 25 cents per hundredweight from the applicable zone price.

* * * * *

Section 1364.455 (a) (2). "Carload" means: (i) A shipment by rail of fresh or frozen wholesale meat cuts, and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing to a single delivery point, of at least the minimum weight upon which the railroad carload rate from the point of shipment to the delivery point, as evidenced by the tariffs of railroad carriers, is based. Provided, That where the transportation charge for shipment of a lesser weight at the railroad carload rate would be lower than the transportation charge for such a shipment at the railroad less-than-carload rate, such lesser weight shall be considered a carload.

(ii) A shipment by motor truck or trucks to a single delivery point of 15,000 pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing, as a single bulk sale transaction; and

(iii) Any single bulk sale transaction wherein the buyer takes delivery at the seller's place of business of 15,000 pounds or more of fresh or frozen wholesale meat cuts and/or cured meat cuts, meat or processed products and/or carcasses, or any combination of the foregoing.

3. Pertinent provisions of Maximum Price Regulation No. 398 (8 F. R. 11084):

Section 15 (b). Carload discount. For all variety meats and edible by-products delivered in a straight or mixed carload shipment or sold as a part of a straight or

mixed carload sale, the seller shall deduct 25 cents per hundredweight from the applicable zone price.

4. Pertinent portions of Statement of Considerations accompanying Revised Maximum Price Regulation No. 169 (Pike and Fischer, *OPA Food Desk Book,* Vol. 4, p. 46, 461):

* * * * *

Provisions have been made in the regulation to allow for adjustment in price to cover extra costs involved. On the same basis a reduction in the price must be made where certain costs are not incurred. The base price in the regulation has been established for less than carload lots, whereas it costs less to sell in larger quantities. Recognizing this, the specified maximum prices are reduced 75 cents per hundredweight where 15,000 pounds or more of beef or mixed meats are delivered to a single destination in a carload shipment. This reduction roughly reflects the savings in handling and selling costs which are effected when a single buyer takes one delivery of a volume this large.

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